

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DRISCOLL M.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Case No. C23-0185-SKV

ORDER REVERSING THE
COMMISSIONER'S DECISION

Plaintiff seeks review of the denial of his application for Supplemental Security Income. Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court **REVERSES** the Commissioner's final decision and **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

BACKGROUND

Plaintiff was born in 1980, has an associate's degree, and previously worked as a plastic molding machine technician and residential rehabilitation counselor. AR 67-71. Plaintiff was last gainfully employed in 2008. AR 1041.

In April 2017, Plaintiff applied for benefits, with an amended alleged onset date of September 14, 2017. AR 758. Plaintiff's application was denied initially and on reconsideration, and Plaintiff requested a hearing. AR 147-50, 154-59. After the ALJ conducted

1 a hearing in January 2019 (AR 64-91), the ALJ issued a decision finding Plaintiff not disabled.
2 AR 15-22.

3 The Appeals Council denied Plaintiff's request for review (AR 1-6), and Plaintiff sought
4 judicial review. The U.S. District Court for the Western District of Washington granted the
5 parties' stipulation to reverse the ALJ's decision and remand for further administrative
6 proceedings. AR 853-54. On remand, a different ALJ held a hearing in November 2022 (AR
7 782-823), and subsequently entered a decision finding Plaintiff not disabled. AR 757-75.

8 THE ALJ'S DECISION

9 Utilizing the five-step disability evaluation process,¹ the ALJ found:

10 **Step one:** Plaintiff has not engaged in substantial gainful activity since his application
11 date.

12 **Step two:** Plaintiff has the following severe impairments: degenerative disc disease,
13 gastrointestinal disorder, chronic pancreatitis, asthma/chronic obstructive pulmonary
14 disorder, and anxiety disorder.

15 **Step three:** These impairments do not meet or equal the requirements of a listed
16 impairment.²

17 **Residual Functional Capacity (RFC):** Plaintiff can perform light work with additional
18 limitations: he can stand/walk for three hours in an eight-hour workday, and can sit for
19 six hours in an eight-hour workday in one-hour increments, between which he needs to
20 change positions for a few minutes at the workstation and can continue working while in
21 the changed position. He can never climb ladders, ropes, or scaffolds. He can
22 occasionally climb ramps and stairs, balance, stoop, kneel, crouch, and crawl. He must
23 avoid concentrated exposure to vibrations, pulmonary irritants, and hazards. He can have
superficial and occasional interaction with the general public. He can work in the same
room with co-workers and with no coordination with co-workers. He requires an
additional two breaks during the workday of five minutes each.

24 **Step four:** Plaintiff cannot perform his past relevant work.

25 **Step five:** As there are jobs that exist in significant numbers in the national economy that
Plaintiff can perform, Plaintiff is not disabled.

¹ 20 C.F.R. § 416.920.

² 20 C.F.R. Part 404, Subpart P, App. 1.

1 AR 757-75.

2 Plaintiff appealed the final decision of the Commissioner to this Court. Dkt. 4.

3 LEGAL STANDARDS

4 Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social
5 security benefits when the ALJ's findings are based on harmful legal error or not supported by
6 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir.
7 2005). As a general principle, an ALJ's error may be deemed harmless where it is
8 "inconsequential to the ultimate nondisability determination." *Molina v. Astrue*, 674 F.3d 1104,
9 1115 (9th Cir. 2012) (cited sources omitted). The Court looks to "the record as a whole to
10 determine whether the error alters the outcome of the case." *Id.*

11 Substantial evidence is "more than a mere scintilla. It means - and means only - such
12 relevant evidence as a reasonable mind might accept as adequate to support a conclusion."
13 *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (cleaned up); *Magallanes v. Bowen*, 881 F.2d
14 747, 750 (9th Cir. 1989). The ALJ is responsible for evaluating symptom testimony, resolving
15 conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v.*
16 *Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record
17 as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the
18 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is
19 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that
20 must be upheld. *Id.*

21 DISCUSSION

22 Plaintiff argues that the ALJ erred in discounting his alleged need for bathroom breaks up
23 to 15 minutes in length and, in the alternative, whether the ALJ should have further developed

1 the record as to the duration of the bathroom breaks Plaintiff needs. The Commissioner argues
2 the ALJ's decision is free of harmful legal error, supported by substantial evidence, and should
3 be affirmed.

4 **A. The ALJ Erred in Assessing Plaintiff's Testimony Regarding Bathroom**
5 **Breaks**

6 The ALJ summarized Plaintiff's testimony regarding his gastrointestinal issues and
7 corresponding need for bathroom breaks as follows:

8 [Plaintiff] said that his gastrointestinal issues are unpredictable and when he has a
9 flareup, he needs access to a restroom 10 to 15 times a day or more. [Plaintiff] said
10 that he has minor flares three to four times a month, and the major ones do not
11 happen often. Minor flares involve multiple trips to the bathroom, nausea, and
12 some vomiting; major flares are when his symptoms persist and last for multiple
13 times a day, he said that these happen two to three times per month. He said that
14 he has tapered off methadone but continues to have gastrointestinal issues.
15 [Plaintiff] testified that when he is in the restroom, his visits can last from five to
16 15 minutes and said that the process takes a lot of time from his day.

17 AR 763. The ALJ found that the record indicated that Plaintiff did not require any treatment
18 beyond medication for his condition, and that after Plaintiff stopped taking methadone, his
19 gastrointestinal issues improved. AR 765. According to the ALJ, there is no objective support
20 for the persistent, ongoing limitations that Plaintiff described. *Id.*

21 Absent evidence of malingering, an ALJ's reasons for discounting a claimant's
22 allegations must be clear and convincing. *See Burrell v. Colvin*, 775 F.3d 1133, 1136-37 (9th
23 Cir. 2014). Plaintiff contends that the ALJ failed to provide clear and convincing reasons to
discount his allegation that he needs bathroom breaks of up to 15 minutes in duration. Dkt. 9 at
5-7. The Court agrees, because the only valid reason provided by the ALJ for discounting that
testimony is the lack of objective support, and the Ninth Circuit has repeatedly and recently held
that a lack of objective support cannot solely support an ALJ's discounting of a claimant's
testimony. *See, e.g., Smartt v. Kijakazi*, 53 F.4th 489, 498 (9th Cir. 2022).

1 The Commissioner urges the Court to affirm the ALJ's other lines of reasoning,
2 specifically the ALJ's finding of Plaintiff's conservative treatment (medication) and the finding
3 that Plaintiff's symptoms improved after he stopped using methadone.³ Dkt. 16 at 4-5. That a
4 claimant's course of treatment is conservative can undermine an allegation of disabling
5 impairments, except where no non-conservative treatment options exist. Here, the medical
6 expert testified that there are no other forms of treatment for chronic pancreatitis, other than what
7 Plaintiff received. *See* AR 797. Thus, the ALJ erred in suggesting that Plaintiff's course of
8 treatment undermined his complaints of disabling limitations. *See, e.g., Lapierre-Gutt v. Astrue*,
9 382 F. App'x 662, 664 (9th Cir. Jun. 9, 2010) ("A claimant cannot be discredited for failing to
10 pursue non-conservative treatment options where none exist.").

11 Furthermore, Plaintiff admitted at the hearing that his symptoms improved after he
12 stopped using methadone, but nonetheless testified that some of the symptoms persisted. *See* AR
13 807-08. Thus, although the Commissioner accurately notes that evidence of improvement with
14 treatment is a legally sufficient reason "to reject claims of lack of improvement" (Dkt. 16 at 4),
15 Plaintiff here admitted improvement. Thus, the evidence of improvement does not contradict his
16 allegations.

17 Therefore, the only remaining reason to discount Plaintiff's testimony regarding the
18 frequency and duration of his bathroom breaks is the lack of objective support. Plaintiff does not
19 explicitly disagree that there is no objective support for that allegation, but emphasizes that this
20 reason alone cannot support the ALJ's rejection of that testimony. Dkt. 17 at 3. As explained
21 *supra*, Plaintiff's argument is supported by Ninth Circuit precedent and the Court thus finds

22
23 ³ The Commissioner also points to evidence of Plaintiff's non-compliance with treatment
recommendations as inconsistent with his allegations (Dkt. 16 at 7), but the ALJ did not cite this line of
reasoning in her assessment of Plaintiff's testimony and the Court will therefore not consider it as a basis
for affirming this part of the ALJ's decision.

1 reversible error in the ALJ's assessment of this part of Plaintiff's testimony. *See Smartt*, 53
2 F.4th at 498.

3 **B. The Appropriate Remedy is a Remand for Further Proceedings**

4 The Court has discretion to remand for further proceedings or to award benefits. *See*
5 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). However, a remand for an immediate
6 award of benefits is an "extreme remedy," appropriate "only in 'rare circumstances.'" *Brown-*
7 *Hunter v. Colvin*, 806 F.3d 487, 495 (9th Cir. 2015) (quoting *Treichler v. Comm'r of Soc. Sec.*
8 *Admin.*, 775 F.3d 1090, 1099 (9th Cir. 2014)). *Accord Leon v. Berryhill*, 880 F.3d 1044, 1045
9 (9th Cir. 2017) ("An automatic award of benefits in a disability benefits case is a rare and
10 prophylactic exception to the well-established ordinary remand rule.").

11 Before remanding a case for an award of benefits, three requirements must be met. First,
12 the ALJ must have "failed to provide legally sufficient reasons for rejecting evidence, whether
13 claimant testimony or medical opinion." *Brown-Hunter*, 806 F.3d at 495 (quoting *Garrison v.*
14 *Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014)). Second, the Court must conclude "the record has
15 been fully developed and further administrative proceedings would serve no useful purpose."
16 *Id.* In so doing, the Court considers the existence of "outstanding issues" that must be resolved
17 before a disability determination can be made. *Id.* (quoting *Treichler*, 775 F.3d at 1105). Third,
18 the Court must conclude that, "if the improperly discredited evidence were credited as true, the
19 ALJ would be required to find the claimant disabled on remand." *Id.* (quoting *Garrison*, 759
20 F.3d at 1021).

21 In this case Plaintiff requests a remand for a finding of disability (Dkt. 17 at 9), but the
22 Court finds that this remedy is inappropriate because there is conflicting evidence in the record
23 regarding the extent of the bathroom breaks required by Plaintiff. Plaintiff testified that during a

1 flare he visited the bathroom 10-15 times per day, and some of those visits were up to 15 minutes
2 in duration, but explained that the flares occurred only a few times per month. AR 803, 807-08.
3 The medical expert testified that based on his review of the record, he believed Plaintiff would
4 require two bathroom breaks (of unspecified duration) beyond the number of bathroom breaks
5 needed for an average employee. AR 796-97. Further proceedings would serve the useful
6 purpose of resolving this conflict in the record to determine the frequency and duration of the
7 bathroom breaks required by Plaintiff, and whether that frequency/duration of bathroom breaks
8 would be tolerated in the workplace. Notably, Plaintiff's opening brief contends that the ALJ
9 should have further developed the record as to the duration of Plaintiff's bathroom breaks (Dkt. 9
10 at 8-9), which suggests that further proceedings would be useful.

11 Accordingly, the Court finds that a remand for further proceedings is the appropriate
12 remedy for the ALJ's error in this case. *See Leon*, 880 F.3d at 1047 ("When there are
13 outstanding issues that must be resolved before a determination can be made, or if further
14 administrative proceedings would be useful, a remand is necessary.").

15 //

16 //

17 //

18 //

19 //

20 //

21 //

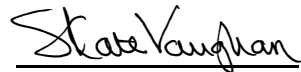
22 //

23 //

CONCLUSION

For the reasons set forth above, the Commissioner's final decision is **REVERSED** and this case is **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. § 405(g). On remand, the ALJ should reconsider Plaintiff's testimony regarding the frequency and duration of his bathroom breaks, and further develop the record on this issue if necessary. The ALJ shall, if necessary, reformulate the RFC assessment and proceed through the remaining steps of the sequential evaluation as needed.

Dated this 25th day of August, 2023.



S. KATE VAUGHAN
United States Magistrate Judge